UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of General Counsel
P.O. Box 21109
Juneau, Alaska 99802-1109

August 15, 2003

MEMORANDUM FOR: Dr. James W. Balsiger
Administrator, Alaska Region

THROUGH: Lisa L. Lindeman
Alaska Regional Attorney

FROM: Lauren M. Smoker
Attorney, Alaska Region

SUBJECT: Interpretation of Magnuson-Stevens Fishery Conservation and Management Act (MSA) language concerning community eligibility in the Western Alaska Community Development Quota (CDQ) Program

By memorandum dated June 13, 2003, you requested "written legal advice about how to interpret and apply the criteria for community eligibility in the MSA." *See* Attachment 1. The following memorandum provides our legal opinion on the various questions you posed as well as an opinion on your preferred interpretation.

This memorandum initially presents a review of the regulatory and statutory development of the eligibility criteria used in the CDQ program. It then presents a brief summary of the applicable legal standards to be applied when interpreting statutory and regulatory language. These standards are then applied on a paragraph-by-paragraph basis to the statutory language and a legal interpretation of the statutory eligibility criteria is presented, followed by a comparison of the statutory language to the regulatory language to determine whether there are inconsistencies between the two such that some action on the part of NMFS is necessary to correct an identified inconsistency. A final section summarizing the findings of this legal analysis is provided at the end of this memorandum.

Statutory and Regulatory History of the Community Eligibility Criteria for the CDQ Program

In March 1992, the Secretary of Commerce approved Amendment 18 to the Bering Sea and Aleutian Islands Area (BSAI) Fishery Management Plan (FMP) that, among other things, allocated one half of the BSAI pollock reserve, or 7.5% of the total allowable catch (TAC) of pollock, to eligible communities in western Alaska.[1] NMFS proposed regulations to implement the western Alaska CDQ program in October 1992 (57 *Fed. Reg.* 46139; October 7, 1992). The proposed rule stated the following concerning eligible communities:

> The CDQ program was proposed to help develop commercial fisheries in western Alaska communities. These communities are isolated and have few natural resources with which to develop their economies. Unemployment rates are high, resulting in substantial social problems. However, these communities are geographically located near the fisheries resources of the Bering Sea, and have the possibility of developing a commercial fishing industry. Although fisheries resources exist adjacent to these communities, the ability to participate in these fisheries is difficult without start-up support. This CDQ program is intended to provide the means to start regional commercial fishing projects that could develop into ongoing commercial fishing industries.

Id., at 46139. In order to identify eligible communities, four eligibility criteria were proposed which had been developed by the Governor of the State of Alaska (Governor), in consultation with the North Pacific Fishery Management Council (Council):[2]

> Prior to approval of a [Community Development Plan] recommended by the Governor, the Secretary will review the Governor's findings as to how each community(ies) meet [sic] the following criteria for an eligible community:
> (i) For a community to be eligible, it must be located within 50 nautical miles from the baseline from which the breadth of the territorial sea is measured along the Bering Sea coast from the Bering Strait to the western most of the Aleutian Islands, or on an island within the Bering Sea. A community is not eligible if it is located on the Gulf of Alaska coast of the North Pacific Ocean even if it is within 50 nautical miles of the baseline of the Bering Sea.
> (ii) The community must be certified by the Secretary of the Interior pursuant to the Native Claims Settlement Act (Pub. L. 92-203) to be a native village.
> (iii) The residents of the community must conduct more than one-half of their current commercial or subsistence fishing effort in the waters of the Bering Sea.
> (iv) The community must not have previously developed harvesting or processing capability sufficient to support substantial fisheries participation in the BSAI, except if

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[1] *See generally,* Final Rule implementing Amendment 18 to the BSAI FMP, 57 *Fed. Reg*. 23321, June 3, 1992. Amendment 18 was effective through December 31, 1995.

[2] 57 *Fed. Reg.* 46139, 46140, Oct. 7, 1992.

> the community can show that benefits from an approved CDP would be the only way to realize a return from previous investments. The communities of Unalaska and Akutan are excluded under this provision.

Id., at 46144 (proposed section 675.27(d)(2)). Under the proposed rule, prior to approval of the Governor's recommendations for approval of Community Development Plans (CDPs) and CDQ allocations of pollock, the Secretary was required to review the Governor's findings to determine if the eligibility criteria had been met by the communities submitting CDPs. *Id.* The proposed rule also included a table that listed the communities that were determined by the Secretary to have met the proposed criteria.[3] *Id.*, at 46145. Finally, the preamble of the proposed rule made it clear that the communities eligible to apply for CDQ allocations of pollock were not limited to those communities listed in the table. *Id.*, at 46140.

A final rule implementing the CDQ Program was published on November 23, 1992.[4] (57 *Fed. Reg.* 54936) Based on public comment, four changes were made to the proposed eligibility criteria in the final rule, two of which are important for this analysis.[5] First, the proposed regulation at 675.27(d)(2) and the heading for Table 1 were changed to require the Governor and Secretary to make findings on the eligibility of a community only if it is not listed on Table 1 (emphasis added). *Id.*, at 54938. The preamble states that this change was made because the State submitted an evaluation of the list of communities in Table 1 against the community eligibility criteria at 675.27(d)(2) that concluded that the communities listed in Table 1 met the

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[3]The following 56 communities were listed in proposed Table 1:
Atka, False Pass, Nelson Lagoon, Nikolski, St. George, St. Paul, Brevig Mission, Diomede/Inalik, Elim, Gambell, Golovin, Koyuk, Nome, Savoonga, Shaktoolik, St. Michael, Stebbins, Teller, Unalakleet, Wales, White Mountain, Alegnagik, Clark's Point, Dillingham, Egegik, Ekuk, Manokotak, Naknek, Pilot Point/Ugashik, Port Heiden/Meschick, South Naknek, Sovonoski/King Salmon, Togiak, Twin Hills, Alakanuk, Chefornak, Chevak, Eek, Emmonak, Goodnews Bay, Hooper Bay, Kipnuk, Kongiganak, Kotlik, Kwigillingok, Mekoryuk, Newtok, Nightmute, Platinum, Quinhagak, Scammon Bay, Sheldon's Point, Toksook Bay, Tununak, Tuntutuliak.
There are four instances where communities are listed with two names separated by a slash. In one instance, the entry represents two separate communities (Pilot Point and Ugashik are separate, ANCSA-certified native villages). For Diomede/Inalik and Port Heiden/Meschick, NMFS has treated these entries to be one community with alternate names. The status of the Savonoski/King Salmon entry is discussed in detail within this memorandum.

[4]This final rule implemented the CDQ program for 1992 and 1993. A subsequent regulatory amendment implemented the CDQ program for 1994 and 1995 (58 *Fed. Reg.* 32874, June 14, 1993). The subsequent regulatory amendment made no changes to the criteria for community eligibility.

[5]The following two changes are somewhat less relevant for the purposes of this analysis: (1) language in proposed section 675.27(d)(2)(iv) was changed from "substantial fisheries participation" to "substantial groundfish fisheries participation" to precisely reflect the intent of the Council (*see* Comment 4 and Response, 57 *Fed. Reg.* 54936, 54938), and (2) in response to a comment requesting inclusion of Akutan, King Cove, and Sand Point as eligible communities, NMFS responded that the Council intended the benefits of the CDQ program to be limited to communities within a specific geographical area of western Alaska and that do not have substantial groundfish harvesting or processing capability – because Akutan has a large groundfish processing plant, and King Cove and Sand Point are located on the Gulf of Alaska, these communities were not included as eligible communities (*see* Comment 12 and Response, *Id.*, at 54939).

criteria. *Id.*

This change has great importance for this analysis for two reasons. First, it removed the requirement that the State and NMFS substantively determine a community's eligibility status using the four eligibility criteria every CDQ allocation cycle. Under the final regulation, if a community was listed on Table 1, it was automatically considered an eligible community for purposes of the CDQ program and CDQ allocations. Second, this change made King Salmon an eligible community even though King Salmon was not a community that was certified by the Secretary of the Interior pursuant to the Alaska Native Claims Settlement Act (ANCSA) (43 U.S.C. 1601 et seq.) to be a native village.[6] During Council deliberations on the CDQ program, the ANCSA certification status of King Salmon was discussed. The Council recognized that King Salmon was not an ANCSA-certified village, but that King Salmon was pursuing certification as a native village with the Department of the Interior. The Council meeting transcript reflects that on April 22, 1992, the Council decided that when it received notification of King Salmon's certification, Table 1 would be amended to include King Salmon. However, the following day, that condition for the village's participation in the program was not reflected in the final motion passed by the Council, which simply read "...that King Salmon be added to Savonoski." Transcript of Council deliberations on April 23, 1992; North Pacific Fishery Management Council Minutes for the 101st Plenary Session, April 22-26, 1992, page 10. Paired with Savonoski, King Salmon was added to the list of CDQ eligible communities on Table 1 in the regulations.

The second important change was to proposed section 675.27(d)(2)(iii). The preamble of the final rule states that this criterion was to be revised to change the language "waters of the Bering Sea" to "waters of the Bering Sea and Aleutian Islands management area and adjacent waters." Comment 7 and Response, 57 *Fed. Reg.* 54936, 54938, Nov. 32, 1992. NMFS determined that this change was appropriate in order to more accurately describe the applicable area using an already defined term at 675.2 in order to eliminate confusion about the meaning of this criterion. *Id.*, at 54938. Although the preamble stated that this change would be made to the final regulatory text, the stated change was not completely made – the portion of the phrase "and adjacent waters" was omitted in the final regulatory text. Section 675.27(d)(2)(iii) in the final rule references only "the Bering Sea and Aleutian Islands management area" and does not include the reference to adjacent waters. *Id.*, at 54944. The omission could be interpreted as a decision to permit only harvests from the EEZ to count towards satisfying this criterion. However, the preamble language evidences an intent that commercial and subsistence harvests from the EEZ as well as adjacent waters, which could be interpreted to include State waters to three nautical miles, would be considered in determining whether a community met this

[6]Although the preambles of the proposed and final rules state that the communities listed in Table 1 met the eligibility criteria (*see* 57 *Fed. Reg.* 46139, 46140 (Oct. 7, 1992); and 57 *Fed. Reg.* 54936, 54938 (Nov. 23, 1992)), King Salmon was not an ANCSA-certified native village at the time of the rulemaking. Through letter and email, the Department of Interior recently confirmed that King Salmon has not received ANCSA certification. Letter to Sally Bibb, NMFS, from Joe Labay, U.S. Department of Interior, Bureau of Land Management, dated June 8, 1999; and email to Sally Bibb from Joe Labay, dated July 22, 2003.

criterion.

In November 1993, NMFS issued a final rule implementing a CDQ program for halibut and sablefish harvested with fixed gear.[7] The preamble of the proposed rule states that the communities that were eligible to apply for the pollock CDQ program are the same communities that would be eligible to apply for sablefish and halibut CDQs.[8] As for the community eligibility criteria, there were no meaningful differences between the halibut/sablefish and pollock CDQ programs except for the language of the first and third criteria. The first criterion for the halibut/sablefish CDQ program specifically stated that communities on the Chukchi Sea coast (in addition to the Gulf of Alaska) were ineligible.[9] The third eligibility criterion for the halibut/sablefish CDQ program stated that the residents of the community must conduct more than one-half of their current commercial or subsistence fishing effort in the waters "surrounding the community," rather than in "waters of the BSAI management area," the language used in the pollock CDQ program.[10] The list of eligible communities on Table 1 for the halibut/sablefish CDQ program remained the same as those listed on Table 1 for the pollock CDQ program.[11]

In December 1995, Amendment 38 to the BSAI FMP was implemented.[12] Amendment 38 continued the western Alaska pollock CDQ program, extending it to December 31, 1998. Amendment 38 contained no changes to the criteria for community eligibility.

In February 1996, a final rule was published that moved Table 1 in Part 675 (the list of eligible communities for the pollock CDQ program) to Part 672 and renumbered it as Table 7.[13]

On June 19, 1996, NMFS issued a final rule that consolidated CDQ program regulations found at Parts 672, 675 and 676 into Part 679.[14] The consolidation combined the pollock and the

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[7]58 *Fed. Reg.* 59375, Nov. 9, 1993. The halibut/sablefish fixed gear CDQ program was codified at 50 CFR Part 676.

[8]57 *Fed. Reg.* 57130, 57142, Dec. 3, 1992.

[9]58 *Fed. Reg.* 59375, 59411, Nov. 9, 1993.

[10]*Id.*

[11]*Id.*, at 59413.

[12]A proposed rule was published on September 18, 1995 (60 *Fed. Reg*. 48087) and the final rule was published on December 12, 1995 (60 *Fed. Reg.* 63654).

[13]61 *Fed. Reg*. 5608, February 13, 1996.

[14]61 *Fed. Reg.* 31228, June 19, 1996. The preamble of the final rule states that the rule does not make any substantive changes to the existing regulations but rather "reorganizes the management measures into a more logical and cohesive order, removes duplicative and outdated provisions, and makes editorial changes for readability, clarity and to achieve uniformity in regulatory language" in response to President Clinton's Regulatory Reform Initiative. *Id.* Because the rule made only non-substantive changes to existing regulations originally issued after prior notice

halibut/sablefish CDQ regulations into one subpart, Subpart C, which included one section with the criteria for community eligibility, section 679.30(d)(2). In doing so, some of the language that was unique to the halibut/sablefish eligibility criteria was replaced with language used in the pollock eligibility criteria. The new language, with references to changes from the halibut/sablefish eligibility criteria in brackets and bold, read as follows:

> Prior to approval of a CDP recommended by the Governor, NMFS will review the Governor's findings to determine that each community that is part of a CDP is listed in Table 7 of this part or meets the following criteria for an eligible community:
> (i) The community is located within 50 nautical miles from the baseline from which the breadth of the territorial sea is measured along the Bering Sea coast from the Bering Strait to the western most of the Aleutian Islands, or on an island within the Bering Sea. A community is not eligible if it is located on the GOA coast of the North Pacific Ocean, even if it is within 50 nautical miles of the baseline of the Bering Sea. [**The halibut/sablefish CDQ program reference to the exclusion of Chukchi Sea coastal communities was removed**.]
> (ii) The community is certified by the Secretary of the Interior pursuant to the Native Claims Settlement Act (Pub. L. 92-203) to be a native village.
> (iii) The residents of the community conduct more than half of their current commercial or subsistence fishing effort in the waters of the BSAI. [**Note that the halibut/sablefish CDQ program language of "waters surrounding the community" was not incorporated into this criterion and only the language from the pollock CDQ program remained**.]
> (iv) The community has not previously developed harvesting or processing capability sufficient to support substantial groundfish fisheries participation in the BSAI, unless the community can show that benefits from an approved CDP would be the only way to realize a return from previous investments. The communities of Unalaska and Akutan are excluded under this provision.

61 *Fed. Reg.* 31228, 31265-66, June 19, 1996. No changes were made to Table 7 and the list of eligible communities with this rulemaking.

On August 12, 1996, NMFS published a final rule adding the community of Akutan to Table 7 as an eligible community and removing the language in the fourth criterion that explicitly excluded Akutan as an eligible community.[15] 61 *Fed. Reg.* 41744. The proposed rule noted that when the pollock CDQ program was implemented in 1992, NMFS determined that Akutan met the first three eligibility criteria but failed to meet the fourth because a large groundfish processing plant

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and opportunity for comment, NMFS waived prior notice and delayed effectiveness under 5 U.S.C. 553(b)(B) and (d). *Id.*, at 31229.

[15]An additional minor change made by this rulemaking moved the statement "Other Communities That Do Not Appear on This Table May Also Be Eligible" that was within the Table into the heading for Table 7. 61 *Fed. Reg.* 41744, 41745, Aug. 12, 1996.

was located within Akutan's city limits.[16] However, the Aleutian Pribilof Island Community Development Association, a CDQ group, provided the Council and NMFS with information showing that despite the presence of the processing plant, the city of Akutan gained little benefit from it and in fact met the fourth criterion for community eligibility in the CDQ program.[17] The addition of Akutan to Table 7 resulted in 57 communities being listed as eligible to participate in the CDQ program.

On October 11, 1996, the Sustainable Fisheries Act (SFA), Pub. L. 104-297, was signed into law. Among other things, section 111 of the SFA amended the MSA at section 305(i)(1) to include specific provisions for a western Alaska CDQ Program.[18] Briefly, section 111 established a western Alaska CDQ program under which a percentage of the total allowable catch of each Bering Sea fishery is allocated to the program, set forth community eligibility criteria for participation in the CDQ program, and placed some temporary restrictions on the species and amounts that could be allocated to the CDQ program. While the MSA community eligibility criteria are similar in many respects to the regulatory criteria, they differ in some significant ways that are discussed in more detail below.

Both the House of Representatives and the Senate prepared bills to amend the MSA in the 104th Congress and both bills included provisions for the establishment of a western Alaska CDQ program. The House of Representatives' version was the Fishery Conservation and Management Amendments of 1995 (H.R. 39). The House Report (H.R REP. NO. 104-171 (1995)) that accompanied H.R. 39 explains that H.R. 39 would have codified the existing CDQ system for the Bering Sea and the existing criteria for approval as a qualified CDQ community. The House Report acknowledges that 56 communities were eligible to participate in the CDQ program at that time. The House Report also states that because of the benefits generated by the Council's and NMFS's CDQ program starting in 1992, the House Resources Committee determined that it was important to continue the CDQ program and that, in addition to pollock, sablefish and halibut, the program should be expanded to allow communities participating in the program the opportunity to harvest a percentage of the total allowable catch of each Bering Sea fishery.

The Senate bill, S. 39, was the Sustainable Fisheries Act, and the Senate bill ultimately was passed in lieu of the House bill.[19] The Senate Report (S. REP. NO. 104-276, at 26 (1996)) that accompanied S. 39 states that "New subsection (i) is intended to ensure that western Alaska and western Pacific fishermen who historically fished in the U.S. EEZ are treated fairly and equitably as intended under the Magnuson Act." The most direct reference in the Senate Report to the eligibility criteria states that the SFA "would establish community eligibility criteria that are

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[16]61 *Fed. Reg.* 24475, May 15, 1996.

[17]*Id.*, at 24475-76.

[18]The statutory language in the MSA for community eligibility is presented later in this memorandum in comparison form to the current regulatory text.

[19]Sustainable Fisheries Act, Pub. L. No. 104-297, 1996 U.S.C.C.A.N. (110 Stat. 3559) 4073.

based upon those previously developed by the North Pacific Council and Secretary, limiting such eligibility to those villages, including Akutan, that presently participate in the pollock and halibut/sablefish CDQ programs." *Id.*, at 28.

In 1998, shortly after the passage of the SFA, NMFS expanded the CDQ program into a multispecies program that allocated 7.5 percent of all BSAI groundfish TACs not already covered by a CDQ program along with a pro-rata share of the prohibited species catch limit, and a graduated percentage of BSAI crab to the CDQ program.[20] While many changes were made to the CDQ program with the multispecies amendment, the community eligibility criteria continued as it had been published in the consolidation rule with the subsequent change to include Akutan – no substantive changes were made to the wording of the eligibility criteria and no changes were proposed to Table 7.[21] Neither the proposed nor the final rules included an explanation as to how the regulatory definition of eligible community compared to the MSA language at section 305(i)(1)(B) or whether the regulatory and the statutory eligibility criteria were consistent with each other. The definition of eligible community that was included in the final rule for the multispecies CDQ program is the current definition of eligible community.[22]

By letter dated March 8, 1999, the State recommended to NMFS that eight additional communities be deemed eligible for participation in the CDQ Program.[23] After reviewing the State's recommendation and supporting documentation, NMFS, by letter dated April 19, 1999, agreed with the State's recommendations and determined that the eight communities were eligible for the CDQ Program, bringing the total number of eligible communities to 65. In August 2001, NMFS proposed to add these eight communities to Table 7,[24] but withdrew the change in the final rule, stating that revisions to Table 7 would be considered by NMFS in a future rulemaking that would address a wider range of CDQ issues.[25] Despite their not being listed on Table 7, these eight communities have been considered eligible for the CDQ program

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[20]62 *Fed. Reg.* 43866, 43872, Aug. 15, 1997 (proposed rule); 63 *Fed. Reg.* 8356, Feb. 19, 1998; 63 *Fed. Reg.* 30381, 30398, June 4, 1998; and 63 *Fed. Reg.* , Oct. 1, 1998 (three final rules).

[21]With this rulemaking, the eligibility criteria in section 679.30(d)(2) were moved to the definitions section of Part 679, section 679.2, to define the term "eligible community."

[22]The regulatory language in the final rule for the Multispecies CDQ Program (i.e. the current regulatory definition of eligible community) is presented later in this memorandum in comparison form to the statutory language of the MSA.

[23]The eight additional communities are Ekwok, Grayling, Levelock, Mountain Village, Napakiak, Napaskiak, Oscarville, and Portage Creek.

[24]66 *Fed. Reg.* 41664, August 8, 2001.

[25]67 *Fed. Reg.* 4100, January 28, 2002.

since April 19, 1999.[26]

Applicable Legal Standards for Statutory Construction

Under the rules of statutory construction, the language of a statute is controlling and takes precedence over the language of an existing regulation if the regulation is not consistent with the statutory language. A statute is the charter for the administrative agency charged with implementing it.[27] A regulation issued by an agency under the authority of a particular statute therefore must be authorized by and consistent with the statute and administrative action in excess of the authority conferred by the statute is *ultra vires*.[28] Because Congress is the source of a federal administrative agency's powers, the provisions of the statute will prevail in any case of conflict between a statute and an agency regulation implementing that statute.[29] Additionally, because the legislative process culminates in an official, authoritative expression of legal

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[26]Under the current regulations, NMFS must make determinations as to whether the communities represented by the CDPs meet the eligibility criteria in 50 C.F.R. 679.2. During the application process for the 2001-2002 CDQ allocation cycle, a challenge was raised by one of the CDQ groups, questioning whether some of the communities considered eligible by the State and NMFS actually met the eligibility criteria, particularly the criterion requiring one half of a community's current commercial and subsistence fishing effort be conducted in the waters of the BSAI. For the 2001-2002 allocation cycle, NMFS stated in its decision memorandum that all 65 communities were considered eligible for the 2001-2002 allocation cycle because NMFS previously approved the State's recommendations that the communities were eligible to participate in the CDQ program and no new information was presented that demonstrates ineligibility. Decision Memorandum from James W. Balsiger to Penelope D. Dalton, dated January 17, 2001.

Although none of the CDQ groups challenged the eligibility status of any of the 65 communities during the application process for the 2003-2005 CDQ allocation cycle, in accordance with its regulations, NMFS made determinations as to whether the communities represented by the CDPs met the eligibility criteria in section 679.2. During its review, NMFS concluded that 57 of the communities listed in the CDPs were eligible communities and met the requirements of 679.30(a)(1)(iv) and 679.2 by virtue of the fact that they were listed on Table 7. Letter to Jeffery W. Bush, Deputy Commissioner, Alaska Department of Community and Economic Development, From James W. Balsiger, dated January 17, 2003, Attachment 2, at 13-15. As for the eight remaining communities (those communities deemed eligible in April 1999), NMFS re-reviewed the information submitted by the State in 1999 and found that the State had applied a much broader scope than was set forth in the fishing effort criterion and had submitted information that appeared to indicate that some of the communities probably do not meet that criterion. *Id.*, at 15-16. As a result, NMFS stated that several of these eight communities may not meet all of the eligibility criteria and therefore may not be eligible to participate in the CDQ program. *Id.*, at 16. However, because NMFS lacked all of the information necessary to conclude definitively that these communities were ineligible to participate, NMFS determined that, until it can thoroughly examine all of the relevant information regarding eligibility for all communities currently listed in the CDPs, all 65 communities represented by the CDPs were deemed eligible to participate in the 2003-2005 allocation cycle. *Id.*

[27]Singer, Norman J., Sutherland Statutory Construction § 31.02 (5th ed. 1992).

[28]*Id*.

[29]*Id.*

standards and directives,[30] the deference typically afforded to an agency interpretation of a statute will not apply when the agency's interpretation is in conflict with a subsequently enacted legislative mandate.[31]

Prior to the SFA, the Council and NMFS interpreted the MSA as providing the authority to develop and implement the western Alaska CDQ Program, including the criteria that would be considered for community participation. Congress acknowledged the existence of this authority in the legislative history for the SFA. S. REP. NO. 104-276, at 27. In October 1996, when the MSA was amended, Congress spoke to the issue of community eligibility and provided definable boundaries for community participation in the CDQ program. And although Congress stated in the legislative history that the SFA would establish community eligibility criteria that are based upon those previously developed by the Council and NMFS, Congress did not use language that is identical to the regulatory eligibility criteria. Based on the rules of statutory construction outlined above, the eligibility criteria set forth in the MSA control and take precedence over the regulatory criteria set forth in 50 C.F.R. § 679.2 to the extent there is any conflict between the statutory and regulatory language. Additionally, because Congress has now specifically addressed the issue of community eligibility for the CDQ Program, NMFS's previous interpretation of the MSA as providing the Council and agency the ability to implement eligibility criteria consistent with the general provisions of the MSA cannot be maintained to the extent that the regulatory criteria are in conflict with the statutory language of the MSA.

When there is a question concerning the interpretation of a statute, several principles of law are applied and considered in order to interpret the statute's meaning. These principles are known as the rules of statutory construction. One of the guiding principles of statutory interpretation is that when the language of the statute is clear and unambiguous and not unreasonable or illogical in its operation, a court may not go outside the statute to give it meaning.[32] This is known as the plain meaning rule. Only statutes that are ambiguous are subject to the process of statutory interpretation.[33] Ambiguity exists when a statute is capable of being understood by reasonably well informed persons in two or more different senses.[34] Even if a specific provision is clearly worded, ambiguity can exist if some other section of the statutory program expands or restricts the provision's meaning, if the plain meaning of the provision is repugnant to the general purview of the act, or if the provision when considered in conjunction with other provisions of

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[30] *Id.*, at § 27.01.

[31] *Id.*, at § 31.06.

[32] Singer, Norman J., Sutherland Statutory Construction § 46:01(6th ed. 2000).

[33] *Id.*

[34] *Id.*, at § 46:04.

the statutory program, or with the legislative history of the subject matter, import a different meaning.[35]

Interpretation of the MSA eligibility criteria and determinations as to whether the regulatory language is inconsistent or in conflict with the statutory language

This section of the memorandum provides a legal interpretation of the MSA eligibility criteria as well as a comparison of the statutory and regulatory language to determine whether inconsistencies or conflicts exist between the two texts. This is presented in a paragraph-by-paragraph format.

The following is a side-by-side comparison of the regulatory[36] and statutory text:

Regulatory text at 50 C.F.R. 679.2	Statutory text at 16 U.S.C. 1855(i)(1)(B)
Eligible community means a community that is listed in Table 7 to this part or that meets all of the following requirements:	To be eligible to participate in the western Alaska community development quota program under subparagraph (A) a community shall – **[this introductory text makes no reference to or incorporation of Table 7 or the communities listed on it; each community must meet all of following the eligibility criteria in order to participate in the CDQ Program]**
(1) The community is located within 50 nm from the baseline from which the breadth of the territorial sea is measured along the Bering Sea coast from the Bering Strait to the most western of the Aleutian Islands, or on an island within the Bering Sea. A community is not eligible if it is located on the GOA coast of the North Pacific Ocean, even if it is within 50 nm of the baseline of the Bering Sea.	(i) be located within 50 nautical miles from the baseline from which the breadth of the territorial sea is measured along the Bering Sea coast from the Bering Strait to the western most of the Aleutian Islands, or on an island within the Bering Sea **[substantively identical to the regulatory language];**
	(ii) not be located on the Gulf of Alaska coast of the north Pacific Ocean [**substantively identical to the regulatory language at 679.2 although it omits the regulatory clarification that even if a community is within 50 nm of the baseline of the Bering Sea, it is not eligible if it is located on the GOA coast of the North Pacific Ocean**];

[35] *Id.*, at § 46:01.

[36] The regulatory text displayed in this comparison is the current regulatory language. It is also substantively identical to the regulatory language that existed at the time of passage of the SFA.

Regulatory text at 50 C.F.R. 679.2 (con't)	Statutory text at 16 U.S.C. 1855(i)(1)(B) (con't)
	(iii) meet criteria developed by the Governor of Alaska, approved by the Secretary, and published in the Federal Register **[criterion not within the regulatory language]**;
(2) That is certified by the Secretary of the Interior pursuant to the Native Claims Settlement Act (Pub. L. 92-203) to be a native village.	(iv) be certified by the Secretary of the Interior pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.) to be a Native village [**substantively identical to the regulatory language**];
(3) Whose residents conduct more than half of their current commercial or subsistence fishing effort in the waters of the BSAI.	(v) consist of residents who conduct more than one-half of their current commercial or subsistence fishing effort in the waters of the Bering Sea or waters surrounding the Aleutian Islands **[statutory language does not use the term BSAI but instead uses the phrase "waters of the Bering Sea or waters surrounding the Aleutian Islands"]**; and
(4) That has not previously developed harvesting or processing capability sufficient to support substantial groundfish fisheries participation in the BSAI, unless the community can show that benefits from an approved CDP would be the only way to realize a return from previous investments. The community of Unalaska is excluded under this provision.	(vi) not have previously developed harvesting or processing capability sufficient to support substantial participation in the groundfish fisheries in the Bering Sea, unless the community can show that the benefits from an approved Community Development Plan would be the only way for the community to realize a return from previous investments [**statutory language does not use the term BSAI but instead uses the term Bering Sea**; **also omits the specific exclusion of Unalaska from the CDQ program]**.

Statutory criteria addressing geographical location, ANCSA certification, and consistency with regulatory provisions

The statutory language used in paragraphs 305(i)(1)(B)(i) and (ii) (dealing with geographical location), and paragraph (iv) (requiring ANCSA certification) is clear and unambiguous and there is no need for interpretation. Furthermore, the language used in these paragraphs is substantively identical to the first and second eligibility criteria within the regulatory definition of eligible community at 679.2. Paragraph 305(i)(1)(B)(iii) is not included in the regulatory definition but contains clear and unambiguous language and merely requires communities to meet the regulatory criteria. Based on this comparison, no inconsistencies or conflicts between the statutory and the regulatory language appear to exist for these paragraphs and therefore no changes to the regulatory language are required to make it consistent with the statutory language.

Mandatory nature of statutory criteria and lack of statutory reference to Table 7

Under the rules of statutory construction, use of the word "shall" (except in its future tense) typically indicates a mandatory intent.[37] The introductory language of section 305(i)(1)(B) clearly and unambiguously indicates that a community shall satisfy all of the criteria in order to be eligible. There is no permissive language within the section that would allow the waiver of one or more of the criteria, nor is there language that would recognize some other form of eligibility, such as a grandfather clause. Because the Council and NMFS may only develop regulations that are authorized by and consistent with the statute, the Council and NMFS do not have any discretion to implement or maintain regulations that omit, add, or modify any of the MSA community eligibility requirements. Therefore, only communities that meet all of the MSA eligibility criteria can participate in the CDQ program.

As explained earlier, the ability to be determined an eligible community under the regulations creates an either/or situation – a community can be eligible because it meets all of the regulatory eligibility criteria or it can be eligible by virtue of its listing on Table 7. In other words, under NMFS regulations, a community can participate in the CDQ program even if the community does not meet all of the regulatory eligibility criteria as long as it is listed on Table 7. Because the statute mandates consistency with each eligibility criterion and does not provide an alternative, the lack of statutory reference to Table 7 creates a discrepancy between the statute and the regulations. However, the discrepancy is problematic only if there are communities listed on Table 7 that do not meet all of the statutory criteria. At this time, there is at least one community, King Salmon, that does not meet all of the statutory eligibility criteria. Because Table 7 lists at least one community that does not meet all of the statutory eligibility criteria, NMFS regulations with respect to eligibility through listing on Table 7 are *ultra vires* and Table 7 must be amended to include only those communities that meet all of the MSA eligibility criteria.

Statutory criterion addressing commercial or subsistence fishing effort

MSA section 305(i)(1)(B)(v) requires eligible communities to "consist of residents who conduct more than one-half of their current commercial or subsistence fishing effort in the waters of the Bering Sea or waters surrounding the Aleutian Islands." There are two points of interpretation necessary with this criterion. The first point deals with determining from where must commercial or subsistence fishing effort have come in order to satisfy the phrase "waters of the Bering Sea or waters surrounding the Aleutian Islands." The second point deals with when must commercial or subsistence fishing effort have occurred in order to satisfy the word "current."

[37] Singer, Norman J., Sutherland Statutory Construction § 25.04 (5th ed. 1992).

1. Interpretation of the phrase "waters of the Bering Sea or waters surrounding the Aleutian Islands"

Although the phrase "waters of the Bering Sea or waters surrounding the Aleutian Islands" is not defined within the MSA, a plain reading of the phrase indicates that the area encompasses all State and Federal waters of the Bering Sea or waters surrounding the Aleutian Islands. While the MSA is focused on the regulation of fishing activities conducted in the exclusive economic zone (EEZ), which, in the case of Alaska, begins at 3 nautical miles from the baseline of the territorial sea and extends seaward to 200 nautical miles, Congress did not include the term "EEZ" in the statutory text of this criterion.[38] Congress is well aware of and familiar with the term "EEZ" and its meaning, and uses the term elsewhere in the MSA. Its omission in this criterion coupled with the plain language reading of the phrase argues in favor of an inclusive reading of the phrase "waters of the Bering Sea or waters surrounding the Aleutian Islands" as meaning State as well as Federal waters.[39]

Furthermore, Congress clearly intended both subsistence harvests and commercial harvests to qualify in satisfying this criterion.[40] As explained below, because subsistence harvests cannot come from the EEZ, in order to give meaning to all of the words in this criterion, the phrase "waters of the Bering Sea or waters surrounding the Aleutian Islands" must include harvests from both State and Federal waters.

Subsistence rights can exist under common law through the establishment of exclusive aboriginal title or non-exclusive aboriginal rights, or they can be conferred by statute. In order for fishing or hunting to be considered a subsistence activity, aboriginal title to an area or non-exclusive aboriginal rights over an area must be established, or a statute must recognize the activity as subsistence. Several court cases have ruled on the question of whether native villages can assert exclusive aboriginal title or non-exclusive aboriginal rights under common law or statutory rights in the fishery resources of the EEZ off Alaska. The first of these is *Amoco*

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[38]The legislative history includes a reference to harvests within the EEZ for this criterion. In the Senate Report, there is the following sentence: "New subsection (i) is intended to ensure that western Alaska and western Pacific fishermen who historically fished in the U.S. EEZ are treated fairly and equitably as intended under the Magnuson Act." (Emphasis added.) S. REP. NO. 104-276, at 26 (1996). Although Congress references historic harvests from the EEZ, it is unlikely that Congress meant only harvests from the EEZ. This is based on the discussion above and also other references in the legislative history that indicate the CDQ program is to be administered as it has been by the Council and NMFS, which means historic harvests from State as well as Federal waters would be considered in satisfying this criterion.

[39]"While every word of a statute must be presumed to have been used for a purpose, it is also the case that every word excluded from a statute must be presumed to have been excluded for a purpose." Singer, Norman J., Sutherland Statutory Construction § 46:06 (6th ed. 2000).

[40]It is important to note that fishing effort in this criterion is not limited to groundfish fishing and includes other species of fish, such as halibut and salmon.

Production Co. v. Village of Gambell, 480 U.S. 531, 546-48 (1987).[41] In *Amoco*, the Supreme Court held that Title 8 of the Alaska National Interest Lands Conservation Act (ANILCA), which statutorily recognized Alaska natives' use of public lands for subsistence hunting and fishing, did not apply to the Outer Continental Shelf (OCS) because ANILCA defines public lands to mean federal lands situated "in Alaska" which includes coastal waters to a point three miles from the coastline, where the OCS commences, but does not include waters seaward of that point.[42] In *Native Village of Eyak v. Trawler Diane Marie* (*Eyak I*), 154 F.3d 1090, 1092 (9th Cir. 1998), the court held that federal paramountcy precluded aboriginal title in the OCS.[43] And finally, in *Native Village of Eyak v. Evans (Eyak II)*, No. A98-0365-CV (HRH) (D. Alaska, September 25, 2002), the court held that non-exclusive aboriginal rights could not exist in the OCS due to federal paramountcy and the holding in the *Eyak I* case.[44]

As a result of these holdings, subsistence harvest cannot be considered to come from the EEZ. Because commercial or subsistence harvests can be used to qualify a community for the CDQ program, to interpret the phrase "waters of the Bering Sea or waters surrounding the Aleutian

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[41]In this case, the Alaska native villages of Gambell and Stebbins challenged an OCS lease sale, claiming that under ANILCA the OCS was public land within Alaska, the sale would have adversely affected their aboriginal rights to hunt and fish on the OCS, and that the Secretary of the Interior had failed to comply with section 810(a) of ANILCA which provides protection for natural resources used for subsistence in Alaska. *Amoco*, at 534-35. An earlier decision by the Ninth Circuit had held that the phrase "in Alaska" in section 810(a) was ambiguous and interpreted it to include the OCS. People of Gambell v. Clark, 746 F. 2d 572, 575 (1984).

[42]The MSA defines "EEZ" as "the zone established by Proclamation Numbered 5030, dated March 10, 1983. For purposes of applying this Act, the inner boundary of that zone is a line coterminous with the seaward boundary of each of the coastal States." 16 U.S.C. 1802(11). In *Amoco*, the Supreme Court found that the Submerged Lands Act, 43 U.S.C. § 1312, was made applicable to the State of Alaska under the Alaska Statehood Act and that under section 4 of the Submerged Lands Act, the seaward boundary of a coastal State extends to a line three miles from its coastline and at that line, the OCS commences. *Amoco*, at 547. Therefore, the seaward boundary of the State of Alaska is three nautical miles from its coastline. As such, both the EEZ and OCS start at the same point off the coast of Alaska and for purposes of this discussion, the conclusions reached in these cases regarding the OCS are applicable to the EEZ.

[43]In this case, several Alaska native villages challenged the halibut and sablefish IFQ regulations promulgated by the Secretary of Commerce as violating their rights to the exclusive use and occupancy of the Outer Continental Shelf (OCS). The villages claimed that for more than 7,000 years their members have hunted sea mammals and harvested the fishery resources of the OCS and argued that they are entitled to exclusive use and occupancy of their respective areas of the OCS, including exclusive hunting and fishing rights, based upon unextinguished aboriginal title.

[44]*Eyak II* considered whether non-exclusive hunting and fishing rights on the OCS are legally different from exclusive hunting and fishing rights based on aboriginal title which were precluded by the court in *Eyak I*. Finding that there is no difference between an exclusive claim to hunt and fish in the OSC and a non-exclusive claim when it comes to the doctrine of federal paramountcy, the *Eyak II* court held that since the MSA's passage in 1976, the United States has asserted sovereign rights and exclusive fishery management authority over all fish and continental shelf fishery resources within the EEZ and that the plaintiffs' claims of non-exclusive aboriginal rights in the OCS conflicted with the U.S. assertion and were inconsistent with the paramount rights of the federal government in areas of the ocean beyond the three-mile limit of state jurisdiction. 12-13, 36. The district court decision in *Eyak II* currently is on appeal to the Ninth Circuit.

Islands" as only applying to the EEZ would make ineligible any subsistence harvests by the communities. Such an interpretation would ignore or fail to give meaning to all the words used in the criterion and would be contrary to the rules of statutory construction.[45] Therefore, in order to give full meaning to the language of this criterion, the phrase "waters of the Bering Sea or waters surrounding the Aleutian Islands" must be interpreted to mean State or Federal waters of the Bering Sea or Aleutian Islands.

Given this interpretation, is the regulatory language consistent with this statutory criterion regarding the location of qualifying harvests? There are two regulatory definitions of "BSAI," one for purposes of the commercial king and Tanner crab fisheries, the other for purposes of the groundfish fisheries. 50 C.F.R. 679.2. Both refer only to waters of the EEZ.[46] Given the statutory interpretation above, an inconsistency exists between the statutory and regulatory texts and the regulatory text should be amended to conform with the statutory language. Although this discrepancy exists between the two texts, in practice, NMFS may have applied this criterion as mandated by the MSA language. Recall that earlier in this memorandum it was noted that for both the original pollock CDQ final rule in November 1992 and the halibut/sablefish CDQ final rule in November 1993, commercial or subsistence harvests from Federal or State waters may have been used to determine community eligibility. *See* discussion *infra* on pages 4-5. In order to determine whether all appropriate Federal and State waters commercial or subsistence harvests were considered in a community's eligibility evaluation, NMFS should re-examine the information submitted for currently eligible communities for consistency with this MSA criterion.[47]

2. Interpretation of the term "current"

The second point of interpretation with this criterion deals with when must commercial or subsistence harvests have occurred in order to satisfy the criterion given the use of the word "current." The term "current" appeared in the original language for the pollock CDQ program in 1992 and has been interpreted by NMFS to mean the level of a community's commercial or subsistence harvests at the time of initial evaluation for eligibility. If a community's harvests satisfied this criterion at the time of initial evaluation, then the community was determined to

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[45]"No clause, sentence or word shall be construed as superfluous, void or insignificant if the construction can be found that will give force to and preserve all the words of the statute." Singer, Norman J., Sutherland Statutory Construction § 46:06 (6th ed. 2000).

[46]For King and Tanner crab, "BSAI Area" is defined as "those waters of the EEZ off the west coast of Alaska lying south of Point Hope (68 degrees 21' N. lat.), and extending south of the Aleutian Islands for 200 nm west of Scotch Cap Light (164 degrees 44'36" W. long). For groundfish fisheries, "BSAI management area" is defined as "the Bering Sea and Aleutian Islands subareas . . . ." Both subareas are defined as those portions of the EEZ contained within identified statistical areas. 50 C.F.R. § 679.2

[47]It is important to note that a community's commercial or subsistence fishing effort in State or Federal waters south of the Aleutian Islands would also qualify under this criterion given the statutory reference to waters surrounding the Aleutian Islands.

have satisfied this criterion and no subsequent consideration of a community's harvests was required by NMFS.

The statutory language at 305(i)(1)(B)(v) also uses the term "current" to describe commercial or subsistence harvests. The term is not defined in the MSA and it is subject to several different interpretations. Three possible interpretations are:

> (1) harvests as of the date the SFA was enacted – *i.e.,* on October 11, 1996, more than half of a community's commercial or subsistence harvests must have been from the waters of the Bering Sea or waters surrounding the Aleutian Islands;
> (2) harvests at any given time – *i.e.,* a community must have harvests that would satisfy this criterion at every evaluation period in order to remain an eligible community; or
> (3) harvests that, at the time of initial evaluation for eligibility, satisfy this criterion – *i.e.,* a community would only have to satisfy this criterion at the time it was or is initially considered for eligibility and, once determined to be an eligible community, would thereinafter satisfy this criterion.

In this situation, agencies are permitted to develop a reasonable interpretation of a term.[48] Because the term is ambiguous, the rules of statutory construction permit the use of intrinsic and extrinsic aids in developing an interpretation.[49] For this particular term, there are no intrinsic aids that help illuminate the word's meaning. As for the legislative history, there is nothing that directly assists with an interpretation of the term "current," although there are statements within the legislative history that describe the section as codifying the existing regulatory eligibility criteria, acknowledge that there were 56 communities eligible to participate in the CDQ program at the time of passage of the SFA, and that indicate Congress wanted the communities currently participating in the CDQ Program to continue to be participating communities.[50]

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[48] *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984) (holding that if statute is silent or ambiguous with respect to specific issue, agency's interpretation of statute must be upheld if agency's construction of statute is permissible and not arbitrary, capricious, or "manifestly contrary to the statute").

[49] Intrinsic aids are found within the text of the statute such as the use of context, definition sections, punctuation, etc. Singer, Norman J., Sutherland Statutory Construction § 47:01(6th ed. 2000). Extrinsic aids are sources outside the text of the statute and include the legislative history of a statute, such as committee reports, floor statements, etc. *Id.*, at § 48:01.

[50] H.R. REP. NO. 104-171, at section 14 (1995); S. REP. NO. 104-276, at 28 (1996). Representative Young stated that "The enactment of section 111(a) of S. 39 will provide the North Pacific Fishery Management Council and the Secretary of Commerce the statutory tools required to improve the efficiency of their implementation of the western Alaska community development quota program. And the enactment of section 111(a) will codify Congress strong support for the council and the Secretary's innovative effort to provide fishermen and other residents of Native villages on the coast of the Bering Sea a fair and equitable opportunity to participate in Bering Sea fisheries that prior to the creation of the western Alaska community development quota program was long overdue." CONG. REC. H11418, H11438 (daily ed. Sept. 27, 1996) (statement of Rep. Young).

Since the addition of eligibility criteria to the MSA in October 1996, NMFS appears to have continued its interpretation of the regulatory definition of the term "current" and applied that interpretation to the statutory term with its implementation of the multispecies CDQ program in 1998 and its approval of the eight additional communities in April 1999. As described earlier, the multispecies CDQ program did not change the regulatory eligibility criteria or the communities listed on Table 7. NMFS did not re-evaluate the eligibility of each community for consistency with the current harvests criterion but rather continued with its pre-SFA interpretation that current harvests meant harvests at the time of a community's initial evaluation for eligibility. Similarly, with NMFS's approval of the eight additional communities in 1999, NMFS evaluated a community's harvests as of the time of initial evaluation for eligibility (*i.e.*, 1999) and did not just look at harvests as of October 1996. Also, during the last two CDQ allocation cycles, NMFS has not evaluated a community's commercial or subsistence harvests to determine the community's continuing eligibility. NMFS's continuation of its pre-SFA interpretation of the term "current" since the passage of section 305(i)(1)(B)(v) implies an interpretation of the statutory word "current" that eliminates the first and second possible interpretations of the term.

Because the statutory language is ambiguous with regards to the meaning of the term "current" in 305(i)(1)(B)(v), NMFS was permitted to develop a reasonable interpretation of the term. It appears from actions taken by NMFS subsequent to the passage of section 305(i)(1)(B)(v) that NMFS has applied its past regulatory interpretation. Because the interpretation is within the agency's authority under the MSA, is a logical way to define the term, and appears consistent with the few Congressional statements included within the legislative history regarding this aspect of the criteria, NMFS's interpretation is a reasonable interpretation of the term "current." Because the regulatory language is similar to the statutory language and because the agency's interpretation is reasonable, the regulation is consistent with the statutory provision regarding the term "current" in 305(i)(1)(B)(v) and no changes to the regulations are needed.

Statutory criterion prohibiting previously developed harvesting or processing capability

MSA section 305(i)(1)(B)(vi) excludes communities from the CDQ program that have previously developed harvesting or processing capability sufficient to support substantial participation in the groundfish fisheries of the Bering Sea. The language of this criterion is almost identical to that in the regulations, two differences being that (1) the statutory language references Bering Sea whereas the regulatory language references groundfish fisheries participation in the BSAI, and (2) the regulatory language specifically excludes Unalaska from participation in the CDQ program under this criterion.

The statutory language is relatively clear and unambiguous[51] and includes State and Federal waters that are considered within the Bering Sea. Aside from the non-substantive discrepancy regarding the specific exclusion of Unalaska, the only discrepancy between the statutory and regulatory texts is the lack of identical language regarding the geographical reference. However, the visual discrepancy does not amount to a substantive difference between the two texts because the statutory term "Bering Sea" includes waters directly north of the Aleutian Islands. Due to the FMP management area divisions between the Bering Sea and the Aleutian Islands, the regulatory text must reference both areas in order to encompass the same area. Therefore, there are no inconsistencies between the statutory and regulatory text and no changes to the regulatory text are necessary.

Status of the eight communities deemed eligible in 1999

As described above, upon recommendation of the State, NMFS determined in April 1999 that eight additional communities were eligible to participate in the CDQ program. Although the language of section 305(i)(1)(B) makes no reference to limiting the number of eligible communities to those that were participating at the time the MSA was enacted, there is a reference in the legislative history to this effect. In the Senate Report accompanying the SFA, there is the following sentence: "The subsection also would establish community eligibility criteria that are based upon those previously developed by the North Pacific Fishery Management Council and the Secretary, limiting such eligibility to those villages, including Akutan, that presently participate in the pollock and halibut/sablefish CDQ programs. (Emphasis added)"[52]

You have specifically asked whether this language in the Senate Report must be interpreted as limiting the opportunity to participate in the CDQ program to only those communities that participated in October 1996, thus excluding the eight additional communities that were not deemed eligible until 1999. We are of the opinion that such an interpretation would be contrary to the plain language of the statute. The language at section 305(i)(1)(B) clearly states that any community that meets the eligibility criteria set forth in subparagraphs (i) through (vi) is an eligible community for purposes of the western Alaska CDQ program. Furthermore, the section includes no words that could be construed as limiting participation to only a subgroup of communities that meet those criteria. Therefore, the eight communities determined to be eligible in April 1999 may continue to participate in the western Alaska CDQ program as long as they meet the eligibility criteria set forth in section 305(i)(1)(B). Given the concerns previously expressed by NMFS as to whether these communities do in fact meet the criteria, the eligibility

[51]The term "substantial" in this criterion could be considered ambiguous. However, aside from the geographic reference discrepancy, there are no meaningful differences between the statutory and regulatory language and no statements in the legislative history to indicate that the statutory language is meant to be interpreted or applied in a manner different from the State's and NMFS's previous interpretation and application.

[52]S. REP NO. 104-297, at 28.

of these eight communities should be re-examined in light of the MSA criteria and the legal interpretations provided above.

Conclusions

In your memorandum, you state that NMFS prefers an interpretation of the MSA that would allow the agency to revise the regulations to be consistent with the MSA, but would not require the agency to re-evaluate the eligibility status of the 57 communities determined to be eligible through rulemaking approved and implemented prior to the MSA amendments. Such an interpretation would require the determination that the MSA criteria for community eligibility in the CDQ program are not substantively different from the regulatory criteria contained within the definition of eligible community at 50 C.F.R. 679.2. Based on the foregoing legal analysis, such an approach is not supported.

To summarize the foregoing legal opinions:

– no regulatory change is necessary to the introductory text of the definition of eligible community; however, all communities listed on Table 7 must be communities that have been determined to satisfy all the statutory eligibility criteria.
– no regulatory changes are needed to paragraphs 1 or 2 of the definition of eligible community.
– the regulatory language in paragraph 3 of the definition of eligible community should be amended to clarify that commercial or subsistence fishing effort from State or Federal waters of the Bering Sea or waters surrounding the Aleutian Islands will be considered under this criterion. No other regulatory changes to this paragraph are needed although it is recommended that NMFS clarify its interpretation of the term "current" in this paragraph.
– no regulatory change is needed to paragraph 4 of the definition of eligible community.
– regulatory changes are needed to Table 7 such that only communities that meet all of the statutory criteria are listed in Table 7.
– the eligibility status of all 65 communities currently eligible to participate in the CDQ program should be re-examined in light of this legal opinion to determine whether each community meets all of the statutory eligibility criteria.
– under the MSA, there is no date by which a community must be deemed eligible in order to participate in the CDQ program, and any community that meets the statutory eligibility criteria is eligible to participate in the western Alaska CDQ program.

cc: Jane Chalmers
GCF
Sally Bibb

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
P.O. Box 21668
Juneau, Alaska 99802-1668

June 13, 2003

MEMORANDUM FOR: Lisa L. Lindeman
Alaska Regional Attorney

FROM: For James W. Balsiger
Administrator, Alaska Region

SUBJECT: Interpretation of the Magnuson-Stevens Fishery Conservation and Management Act Requirements With Respect to Communities Eligible for the Community Development Quota Program

The Sustainable Fisheries Act of 1996 amended the Magnuson-Stevens Fishery Conservation and Management Act (MSA) to include community eligibility requirements for the Western Alaska Community Development Quota (CDQ) Program in section 305(i)(1)(B). At the time these amendments were made, we did not identify any need to revise NMFS regulations about eligibility for the CDQ Program.[1] However, due to questions raised by a CDQ group in October 2000, we realized that we may need to examine the consistency of regulations at 50 CFR part 679 with the MSA eligibility criteria and, possibly, re-evaluate the eligibility of at least some communities.

CDQ Program eligibility requirements currently are included in the MSA, the Fishery Management Plan for the Bering Sea and Aleutian Islands Area (FMP), and in 50 CFR part 679. The exact wording of these criteria differ among the three documents. These differences complicate evaluation of consistency and the eligibility status of a community. We intend to prepare an analysis to determine what, if any, revisions are needed to the FMP and NMFS regulations. However, in order to prepare that analysis, we request written legal advice about how to interpret and apply the criteria for community eligibility in the MSA. We are specifically interested in how to apply the statement in the Senate Report on page 4101, that says "The subsection also would establish community eligibility criteria that are based upon those previously developed by the North Pacific Council and Secretary, limiting such eligibility to those villages, including Akutan, that presently participate in the pollock and halibut/sablefish CDQ programs." (excerpt attached)

Should we consider the consistency of the eligibility criteria in the FMP and NMFS regulations by comparing these criteria only to the eligibility criteria in the MSA, or should we also consider the intent of Congress as expressed in the Senate Report? If we consider the intent of Congress in the Senate Report, could we conclude that NMFS should not re-evaluate the eligibility of those

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[1]See "Guide to the Sustainable Fisheries Act" by Margaret Frailey Hayes, 2/28/97, page 48.

57 communities determined to be eligible through rulemaking prior to the MSA amendments? If we made that conclusion, could we also conclude that no communities could be determined eligible for the CDQ Program after the effective date of the Sustainable Fisheries Act, because the Senate Report says "*limiting* such eligibility to those villages, including Akutan, that presently participate"?

The application of the criteria and the resulting eligibility status of some of the CDQ communities will differ depending on which approach we take. NMFS prefers an interpretation of the MSA that would allow us to revise our regulations to be consistent with the MSA, but would not require us to re-evaluate the eligibility status of the 57 communities determined eligible for the CDQ Program through rulemaking approved prior to the MSA amendments. We do, however, believe that the eligibility status of the eight communities determined eligible by NMFS in 1999 but not listed in Table 7, must be re-evaluated and any eligible communities that result from this re-evaluation must be added to Table 7 through proposed and final rulemaking before the next CDQ allocation cycle.

We are fairly certain that application of the current MSA criteria to the 57 communities listed on Table 7 will identify at least one community that doesn't meet the critiera. For example, King Salmon is not certified as a Native village under the Alaska Native Claims Settlement Act. This fact was recognized at the time King Salmon was determined eligible for the CDQ Program in 1992 and listed on Table 7. However, NMFS regulations allow a community to be eligible for the CDQ Program by meeting the eligibility criteria or by being listed on Table 7. This allowance was not included in the MSA eligibility criteria. The outcome of re-evaluation of the other 56 communities on Table 7 would depend on how some of the less objective criteria, such as "current fishing effort," are defined and applied. We are concerned about the negative social and economic consequences, the instability, and the controversy that will occur if we determine that some of the communities that have been participating in the program since 1992 are no longer eligible. In addition, we believe that it is clear from the Senate Report that Congress did not intend to implement different community eligibility criteria or require NMFS to re-evaluate the eligibility status of the communities currently listed on Table 7.

We must present an analysis of this issue to the Council at its October 2003 meeting. The requested legal advice is needed before alternatives for this analysis can be identified and analyzed. If we determine that any communities currently considered eligible for the CDQ Program do not meet the eligibility criteria, we would like to notify these communities well in advance of the October meeting so that they have an opportunity to provide additional information for the analysis and prepare testimony for the Council meeting. Therefore, we would appreciate your legal advice on this matter as soon as possible and preferably no later than July 15, 2003.

Attachment

SUSTAINABLE FISHERIES ACT

P.L. 104–297, see page 110 Stat. 3559

DATES OF CONSIDERATION AND PASSAGE

Senate: September 18, 19, 1996

House: September 18, October 18, 1995; September 27, 1996

Cong. Record Vol. 141 (1995)

Cong. Record Vol. 142 (1996)

Senate Report (Commerce, Science, and Transportation Committee) No. 104–276, May 23, 1996
[To accompany S. 39]

House Report (Resources Committee) No. 104–171, June 30, 1995
[To accompany H.R. 39]

The Senate bill was passed in lieu of the House bill. The Senate Report (this page) is set out below and the President's Signing Statement (page 4120) follows.

SENATE REPORT NO. 104–276

[page 1]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 39) "A bill to amend the Magnuson Fishery Conservation and Management Act to authorize appropriations, to provide for sustainable fisheries, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

PURPOSE OF THE BILL

The purpose of S. 39, the Sustainable Fisheries Act, is to extend the authorization of appropriations for the Magnuson Fishery Conservation and Management Act (Magnuson Act) through fiscal year (FY) 2000. The bill, as reported, also would: (1) require action to prevent overfishing and rebuild depleted fisheries; (2) expand existing Federal authority to identify and protect essential fish habitat; (3) minimize waste and discards of unusable fish; (4) streamline the approval process for fishery management plans and regulations; (5) tighten financial disclosure and conflict-of-interest requirements for members of regional fishery management councils (Councils); (6) impose a moratorium on management programs that allow individual fishing quotas and establish a lien registry and fees for such plans; (7) authorize fishing capacity reduction programs and fisheries disaster relief; (8) broaden and update federal fishery financing programs; and (9) reauthorize other fishery pro-

otherwise finance their operations. While loans for vessels can be secured with a preferred ship mortgage filed in a central registry administered by the Coast Guard under chapter 313 of title 46 of the United States Code, currently there is no comparable mechanism for limited access system permits, an increasingly important component of fisheries conservation and management. New section 305(h) would establish a registry system for limited access system permits intended to be the exclusive means of perfecting security against third parties without notice. The registry system should reduce the risk that security granted by a permit holder will be encumbered by someone else, and reduce the transaction costs associated with financing limited access system permits. The registry system would be exclusive and administered centrally, thereby eliminating the uncertainty presently facing lenders and other secured parties as to the appropriate jurisdiction in which to file. However, the Committee anticipates that the system would be administered on a regional basis, within the region where the particular fishery management plan has been developed, to increase convenience and to eliminate the need to file in multiple jurisdictions or regularly check filings. The registry system would be required to allow for the registration of title to, and interests in, limited access permits, as well provide procedures for changes in the registration of title to such permits upon the occurrence of involuntary transfers, judicial or nonjudicial foreclosures of interest and the enforcement of judgments on interests. The Committee intends that the Secretary rely on other applicable law, including the Uniform Commercial Code, with respect to matters not provided for by new section 305(h), in creating the registry system. Finally, the new subsection would authorize the Secretary to collect a fee of not more than one-half of one percent of the value of a limited access system permit upon registration and transfer to recover the costs of administering the registry system.

Section 111(e) of the reported bill would provide for the transition to the new registry system, requiring secured parties to submit evidence of perfection in a security to the Secretary within 120 days of the final regulations implementing the registry system in order for the perfected interest to remain perfected and effective.

Section 112.—Pacific Community Fisheries

Section 112 would add a new section 305(i) to the Magnuson Act to establish criteria and procedures for CDQ programs. Section 112 of the reported bill also authorizes grants for western Pacific community demonstration projects. The Magnuson Act was enacted to phase out foreign fishing in the U.S. EEZ and when necessary to allocate the resulting fishing opportunities to U.S. fishermen in a manner that would be "fair and equitable to all such fishermen". New subsection (i) is intended to ensure that western Alaska and western Pacific fishermen who historically fished in the U.S. EEZ are treated fairly and equitably as intended under the Magnuson Act.

Between 1976 and 1992, the Eskimo, Aleut and Indian fishermen who resided in Alaska villages along the Bering Sea coast, from Norton Sound to the north side of the Aleutian Islands and including the Pribilof Islands, were not afforded fair and equitable com-

mercial fishing opportunities in the Bering Sea. While fishermen from these communities historically had fished in the Bering Sea for commercial and subsistence purposes, they did not have a fair and equitable opportunity to benefit as the Bering Sea commercial fisheries were "Americanized" because they lacked the significant capital investment needed to participate in the fisheries.

In 1989, Bering Sea fishermen and residents, including Harold Sparck, a long-time resident and leader in western Alaska, brought this matter to the North Pacific Council's attention. At the January 1990 meeting of the North Pacific Council, a member of the North Pacific Council from the state of Washington moved to include CDQs in the analysis of the allocation scheme being considered for the Bering Sea/Aleutian Islands pollock fishery. The motion carried without objection.

After thorough review and public comment, the North Pacific Council adopted a pollock CDQ program in 1991 as part of the pollock fishery inshore/offshore allocation program that passed by a final vote of nine to two. Under this program, 7.5 percent of the annual total allowable catch of Bering Sea pollock is allocated to villages that participate in a western Alaska CDQ program. In 1991, the Council also approved (by a final vote of seven to four, with the NMFS regional director and one member from Alaska voting against, and two members from Washington voting in favor) a halibut and sablefish IFQ program that established a second western Alaska CDQ program under which percentages of the annual total allowable catch of Bering Sea halibut and sablefish are allocated to villages that participate in the program.

In 1993, a lawsuit was filed against the halibut and sablefish program by the Alliance Against IFQs. As an ancillary claim, the Alliance's complaint alleged that the Magnuson Act did not authorize the North Pacific Council to establish the halibut and sablefish CDQ program because the implementation of the program would violate Magnuson Act national standards four and five. In December of 1994, the United States District Court for the District of Alaska rejected this contention, determining that the Magnuson Act delegated the North Pacific Council authority to establish the program and that implementation of the program does not violate provisions of the Magnuson Act.

In June of 1995, the North Pacific Council renewed the pollock CDQ program by unanimous consent (with one abstention). The Council also voted at the meeting (by a vote of eight to two) to allocate 7.5 percent of the total allowable catch of Bering Sea crab to a western Alaska CDQ program, and (by a vote of seven to three, with the NMFS regional director voting against, one member from Washington voting in favor, and one abstention) to allocate 7.5 percent of the total allowable catch of groundfish to a western Alaska CDQ program.

By June of 1995, therefore, the North Pacific Council had recommended allocations to western Alaska CDQ programs for pollock, halibut, sablefish, crab and groundfish—the principal commercially important Bering Sea fishery resources. The Committee notes that these CDQ allocations were supported by North Pacific Council members from Alaska, Washington and Oregon, and that none of the CDQ allocations was recommended by the Council

without the support of one or more North Pacific Council members from Washington or Oregon. New section 305(i) of the Magnuson Act would explicitly provide for the western Alaska CDQ programs and combine them in a single program for regulatory efficiency.

While the North Pacific Council has taken action to begin to provide the opportunities envisioned by the Magnuson Act for fishermen in western Alaska communities, the Western Pacific Council has not yet taken such action with respect to fishermen from western Pacific communities. These fishermen, like the Alaska fishermen, have historically participated in western Pacific fisheries, but have had increasing difficulty in maintaining their participation as the fisheries have changed since enactment of the Magnuson Act. New section 305(i) would authorize the Western Pacific Council to use CDQs and other authority to ensure that western Pacific community fishermen have a fair opportunity to participate in western Pacific fisheries.

CDQ programs would contribute to the development of local economies and markets, the social and economic well-being of participants through enhanced self-sufficiency, and improvements in local infrastructures. Testimony presented to the Committee also indicated that western Alaska CDQ programs have provided millions of dollars in direct economic benefits to the fishermen and vessel owners who are partners with CDQ organizations in harvesting these fishery quotas.

New subsection (i) of section 305 of the Magnuson Act would require the North Pacific Council and the Secretary to establish a western Alaska community development program under which a percentage of the total allowable catch of each Bering Sea fishery is allocated to the program. Bering Sea CDQ programs already recommended or submitted by the North Pacific Council would be combined into a single, more efficient western Alaska CDQ program. The subsection also would establish community eligibility criteria that are based upon those previously developed by the North Pacific Council and Secretary, limiting such eligibility to those villages, including Akutan, that presently participate in the pollock and halibut/sablefish CDQ programs.

This subsection would establish a moratorium through FY 2000 on the submission by the North Pacific Council of a fishery management plan, amendment or regulation to provide a percentage of a Bering Sea fishery for the western Alaska CDQ program unless the Council had recommended a CDQ allocation in the fishery prior to October 1, 1995. The moratorium therefore would limit the new combined western Alaska CDQ program to the pollock, halibut, sablefish, crab and groundfish fisheries until September 30, 2000. In addition the Secretary would be prohibited during that period from approving or implementing a greater percentage of the total allowable catch of the Bering Sea pollock, halibut, sablefish, crab or groundfish fisheries for the western Alaska CDQ program than the North Pacific Council had already recommended as of September 30, 1995 in those fisheries. The effect of this restriction with respect to pollock would be that North Pacific Council and Secretary would be required to continue to allocate a percentage of pollock to the western Alaska CDQ program, notwithstanding the current expiration date for pollock CDQs, but the Secretary would not be al-